FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 661

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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THE STATE BAR OF CALIFORNIA and THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Raphael Konigsberg, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of California to review the denial of his application for admission to the State Bar of California.

Opinions Below.

On March 17, 1954, the Committee of Bar Examiners of the State Bar of California wrote to Raphael Konigsberg informing him that "It is the committee's determination that you have not sustained the burden of proof (1) that you are possessed of the good moral character required by section 6060(c) of the State Bar Act, or (2) that you comply with the provisions of Section 6064.1 of said Act.

"Your application is denied." [A copy of this letter is set forth in full as Ex. "A" attached hereto.]

Thereafter, Petitioner sought review by the Supreme Court of California but on April 20, 1955 his petition was denied without opinion by a divided court; Chief Justice Gibson and Justices Traynor and Carter voting for a hearing.

Thereafter on May 6, 1957, the Supreme Court of the United States reversed and remanded the matter to the Supreme Court of California "for further proceedings not inconsistent with this opinion". (*Konigsberg v. State Bar*, 353 U. S. 252.)

After remand petitioner applied to the Supreme Court of California for immediate admission to the Bar but the court instead vacated its prior order denying the petition for review and referred the entire matter back to the Committee of Bar Examiners for further proceedings. The Committee of Bar Examiners conducted a hearing on September 21, 1957 and thereafter refused to certify Konigsberg for admission to the Bar [see Exhibit B]. Petitioner then sought review of the action of the Bar Examiners and also again applied directly to the Supreme Court for admission to practice.

On October 16, 1959, the Supreme Court of California, *per curiam*, adopted and approved the findings of the Committee of Bar Examiners. Chief Justice Gibson "deemed himself disqualified" and did not participate in the decision. Separate dissenting opinions were filed by Justice Traynor and Justice Peters. The entire opinion, including the two dissenting opinions is attached hereto as Exhibit C.

Jurisdiction.

The judgment of the Supreme Court of California was entered October 16, 1959; timely Petition for Rehearing was filed and said Petition for Rehearing was denied November 10, 1959.

The jurisdiction of this court is invoked under 28 U. S. C. 1257.

The court has heretofore granted certiorari in this matter based upon facts substantially identical with those upon which the case is presently before this court. (*Konigsberg v. State Bar*, 353 U. S. 252; (see also *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232).)

The constitutional provisions and statutes involved are set forth in the Appendix as Exhibit D.

Questions Presented for Review.

1. Whether the judgment of the court below, upholding the action of the State Bar Committee of Bar Examiners, refusing to certify petitioner to the court for admission to practice law in California and denying petitioner's application for admission to the bar of California, is inconsistent with this court's opinion, findings, judgment and mandate in *Konigsberg v. State of California*, 353 U. S. 252 (1957), with the resultant deprivation of petitioner's liberty and property without due process of law and the denial to him of the equal protection of the laws in violation of the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

2. Where this court has held that the petitioner successfully met all state requirements, and that a denial

of petitioner's application for admission to the bar would be a deprivation of petitioner's liberty and property without due process of law, is it not an arbitrary and capricious act and an abridgement of petitioner's right to pursue his chosen profession and right to the exercise of freedom of speech, press and assembly contrary to the due process provisions of the Fourteenth Amendment to coerce petitioner in subsequent state proceedings on remand to reveal his political affiliations as a newly contrived condition to admission to the bar where in the said subsequent proceedings the State Bar Committee of Bar Examiners comes forward with no affirmative or further proof of petitioner's disqualification to warrant or justify the aforesaid limitation upon petitioner's rights under the Constitution?

3. Where the record before this court in *Konigsberg v. State of California*, 353 U. S. 252 (1957), conclusively established that petitioner was of good moral character and did not advocate the forceful overthrow of Government and that petitioner had fulfilled all requirements affecting the right to pursue his chosen profession, and when on remand the record in subsequent proceedings and brought up to date shows the same good moral character and loyalty, is it not arbitrary and capricious and a deprivation of petitioner's liberty without due process of law and denial to him of the equal protection of the laws in violation of the applicable provisions of the Fourteenth Amendment to refuse to certify petitioner for admission to practice law and deny his application for admission to the bar solely because of petitioner's refusal to reveal his political affiliations?

4. Where the entire record demonstrates that petitioner has declined to reveal his political affiliations solely

upon grounds of long held principle and private conscience, is it not a deprivation of petitioner's freedom of speech, press, assembly and conscience, contrary to the due process inhibitions of the Fourteenth Amendment, to deny petitioner admission to the bar solely because of petitioner's conscientious refusal to reveal his political affiliations?

5. Where the entire record reveals that petitioner has met the ordinary requirements for admission to the Bar and has overwhelmingly established his loyalty and good moral character, is it not arbitrary, unreasonable and capricious and a deprivation of petitioner's liberty and property without due process of law to deny petitioner admission to the bar solely because of his refusal to reveal his political affiliations in the light of the state and national interest in a free and independent bar and the free exercise of speech, press, assembly and private conscience?

6. Where the petitioner has met all statutory requirements for admission to the Bar and has complied with all written and formally promulgated rules of the Committee of Bar Examiners as pre-requisites to admission to the Bar and has met every standard established by judicial decision in the State of California relating to admission to the Bar, is it not a denial of petitioner's liberty and property without due process of law and a denial of equal protection of the laws for the petitioner to be denied admission to the Bar on the basis of a "rule" requiring that he answer questions relating to his political affiliations where that "rule" is first announced and tailored to his specific situation at a hearing held seven years after he commenced the study of law and subsequent to the mandate, decision and opinion of the Supreme Court of the United States on the facts of his case?

Statement.

In the year 1950 Raphael Konigsberg entered the University of Southern California Law School and commenced the study of law. In October of 1953 he completed all of the educational requirements and passed the written bar examination offered by the State Bar.

In 1953 and 1954, a series of hearings was held to determine Konigsberg's eligibility under statutory requirements that an applicant for admission to the practice of law be a person of good moral character and not be a person who advocates the overthrow of the Government of the United States by force or violence. (A complete transcript of these hearings is before this court in the record heretofore presented to the court in the matter of *Konigsberg v. The State Bar of California*, decided by this court on May 6, 1957.)

On the record of those proceedings, the Committee of Bar Examiners refused to certify the petitioner, contending that he had failed to meet his burden of proof as required by law. The Supreme Court of California refused to review the matter, although three members (Chief Justice Gibson and Justices Traynor and Carter) voted for a hearing.

Thereafter, this court granted certiorari and handed down its opinion on May 6, 1957, reversing and remanding the matter for further proceedings not inconsistent with the opinion.

On remand to the Supreme Court of California, that court vacated its prior order denying the petition for re-

view and referred the entire matter back to the Committee of Bar Examiners. The committee conducted a hearing on September 21, 1957.[1]

In these proceedings, petitioner moved the committee for a recommendation of immediate admission of the petitioner under the mandate of the Supreme Court. Petitioner pointed out that failure to do so would be a denial of due process and equal protection of the law. [Sept. Rec. p. 5]. The Committee of Bar Examiners denied petitioner's motion and proceeded to conduct the hearing. [Sept. Rec. p. 13].

In the course of this hearing, petitioner produced a witness who had employed petitioner as an office manager for the previous two and one-half years in connection with a tract housing project. This witness said in part:

> "I think he is probably the most honest, both intellectually as well as legally the most honest man I have ever met: That was one of the things that impressed me in the very beginning when I hired him, and it has been re-affirmed by our experiences in the past two and one-half years. His ethics and his attitudes, his sincerity, his loyalty is beyond all reproach." [Sept. Rec. p. 17].

This witness pointed out that the petitioner had become vice-president of numerous corporations operated by the witness and had power to sign checks on the general company account which at times may have "as much as a quarter of a million dollars in it." [Sept. Rec. p. 17].

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[1]The Record of this proceeding is part of the record forwarded by the Supreme Court of California and will be referred to herein as "Sept. Rec. ....."

The Committee was offered the opportunity to cross-examine the witness, but did not do so. [Sept. Rec. p. 19]. Later in the hearing the petitioner submitted thirteen additional letters from lawyers, doctors, certified public accountants, architects and other professional persons relating to his good moral character. [Sept. Rec. p. 56].

The remainder of the hearing consisted of further examination of Konigsberg. [Sept. Rec. pp. 20-56].

Not one single matter derogatory to Konigsberg's moral character, nor any evidence relating to Konigsberg's belief in or advocacy of overthrow of the Government by force and violence, was introduced at the hearing.

At the conclusion of the hearing, the Chairman of the Committee conceded that the Committee had employed an independent investigator to investigate Konigsberg and stated on the record that "prior to the time any information that is adverse to Mr. Konigsberg is considered by the committee, Mr. Konigsberg and you as his counsel will be made aware of that adverse information." [Sept. Rec. p. 58]. At no time during the hearing or subsequent thereto has any adverse information been introduced into the record or otherwise transmitted to the petitioner. The record therefore contains no information adverse to petitioner.

At the September 1957 hearing, petitioner answered all questions asked of him, except the specific question inquiring as to past or present membership in the Communist party. He pointed out that he had declined to answer similar questions on grounds of moral principle at the previous hearings and he "could hardly be expected at this point for expediency to give up principles that have been upheld by the highest court of our country." [Sept. Rec. p. 29].

He continued, however, by stating that:

"Now, if you ask me whether I as a person ever belonged to an organization that advocated the overthrow of the Government by force and violence, according to my knowledge of it, or whether I personally ever advocated this or ever did anything such as throwing a bomb or writing a leaflet or speaking of advocating the overthrow of the Government by force or violence, or even whether I ever attended a meeting at which force and violence was proposed as a course of action, the answer is no. I personally have never been a member of any organization which to my knowledge engaged in such advocacy. I never could be or would be. I never did a thing in that direction, I made clear in the prior hearings." [Sept. Rec. pp. 29-30].

A few moments later the petitioner said:

"I think the record makes very clear, whatever you may think of those principles, that I have tried to live a principled life, and that being the case you can hardly ask me as a matter of conscience or a matter of principle to give up various principles. This would be committing on my part an immoral act. I doubt very much that the committee intends to take the position that to prove his good moral character an applicant must commit what to him is an immoral act." [Sept. Rec. p. 31].

And when petitioner was asked the same question again in another manner, he responded by saying:

"I think my previous answer covers it. I will only reaffirm to my knowledge I have never been a member of such an organization or group, a part of an

organization, or however you want to phrase it. I think this would clarify the matter. May I ask that I think you are rightly concerned with matters of advocacy of the overthrow of the Government, but it seems to me that you had the opportunity in the previous hearings, and you have it now, if you have any evidence of any illegal acts on my part, then they should be brought forward, and give me a chance to answer them, and I will be happy to answer them, not proceed on the basis of mere suspicions. If you have acts, or evidence of any acts, I ask you now to bring them forward so I can answer them." [Sept. Rec. p. 32].

The committee endeavored at several times by words of the chairman to state that they would consider the failure to answer a material question an obstruction of the investigation which would result in a failure to certify Konigsberg. The committee did not specify any rule of the committee, any statute, or any decision of the Supreme Court of the State justifying this conclusion. Any reference to a "Rule" was through the words of the chairman or other members of the committee, during the course of the hearing.

Thereafter the Committee of Bar Examiners refused to certify Konigsberg for admission to the Bar and this action was adopted and approved by the Supreme Court of California. (52 A. C. 799 (1959).)

Petitioner has at all stages of these proceedings indicated that a failure to admit him would be a denial of due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution.

Petitioner raised this constitutional question at the first moment of the new hearing before the Committee of Bar Examiners on September 21, 1957 [Sept. Rec. pp. 5-11] and in his petition to the Supreme Court of California, both before and after the September 21, 1957 hearing. (See Petitioners "Brief in opposition to report of Committee of Bar Examiners and in support of motion to admit petitioner to the practice of law.")

This court stated in *Konigsberg v. State Bar of California*, 353 U. S. 252 that:

> "If it were possible for us to say that the board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far reaching and complex questions relating to freedom of speech, press and assembly."

The Supreme Court of California apparently interpreted the opinion of this court as giving California the right to bar Konigsberg solely because of his refusal to respond to its inquiries into his political associations and affiliations. Petitioner will indicate hereafter that he does not conceive that to have been the intention of this court. Nevertheless, since the Supreme Court of California has chosen to so interpret the opinion of this court, it is clear that "far reaching and complex questions relating to freedom of speech, press and assembly" have been raised by this case which invoke the jurisdiction of this court.[2]

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[2]See also Mr. Justice Peters' dissenting opinion in this matter where he states that "the result of the action (of the majority of the California Court) is that, in my opinion, applicant has been denied due process and equal protection."

Reasons for Granting the Writ.

1. This court has stated that:

> "It is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law."

It is even more incomprehensible that Konigsberg has still been denied admission to the bar of the State of California, more than two years later.

This court reversed and remanded this case for further proceedings not inconsistent with its opinion. Since that remand, the only factual changes in the record are:

a. Because the briefs filed by respondent before this court questioned the probative value of character reference letters submitted by the petitioner at the 1954 hearings, petitioner brought his employer for the previous two and one-half years before the Committee to give the committee an opportunity to cross-examine one of those who attested to his good character. No challenge was made to the truth or accuracy of this testimony and no cross-examination was conducted.[3]

b. Because three years had transpired since the prior hearings, petitioner introduced additional evidence from persons in all walks of professional life in Los Angeles, attesting to his continued good moral character.

c. The Chairman of the Committee of Bar Examiners conceded that the committee had employed an in-

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[3]The failure to examine or cross-examine this witness or any character witnesses offered by Petitioner reinforces the thesis that the Committee was less interested in the truth about Konigsberg's character than in finding and establishing a technical basis for denying him admission to the Bar.

vestigator to investigate the character of petitioner and stated that no adverse evidence to petition was being considered by the committee in reaching its decision.

d. Petitioner offered directly and unequivocally to respond to any questions relating to allegations of wrongdoing affecting petitioner's good moral character or his possible belief in the overthrow of the Government by force and violence. Not one question was asked of petitioner even suggesting that the findings of this court were no longer valid.

e. With this record before the committee, Konigsberg was told that if he failed to answer questions about Communist Party membership, he could be denied admission to the Bar. Konigsberg responded that he had declined on principle to answer prior to the Supreme Court's opinion and he could not for expediency's sake give up his principles after they had been characterized by this court as bearing weight.[4] He specifically volunteered, however, fully to respond to any questions relating to any allegations of wrongdoing.

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[4] "After examination of the record, we are compelled to agree with Konigsberg that the evidence does not rationally support the only two grounds upon which the committee relied in rejecting his application for admission to the bar."

"When these items are analyzed, we believe that it cannot rationally be said that they support substantial doubts about Konigsberg's moral fitness to practice law."

"In this case, we are compelled to conclude that there is no evidence in the record which rationally justifies the finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful otherthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law." (*Konigsberg v. State Bar*, 353 U. S. 252.)

The record of this case since this court's decision and respondent's argument in the matter before the Supreme Court of California, clearly indicates a calculated effort on the part of respondent to subvert the mandate of this court. Respondent couches its denial in language indicating that it denied petitioner admission to the Bar solely because of his refusal to answer specific questions but at the same time respondent continues to rely on improper implications drawn from the articles written by petitioner more than ten years ago as a basis for establishing the relevancy of the questions.[5]

Because not one new fact adverse to petitioner has been entered on the record since the opinion and mandate of this court, petitioner continues to be denied due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution when respondent ignores the mandate of this court and refuses to admit petitioner to the practice of law in the State of California.

2. The aforesaid is reinforced by examination of the legal requirements for admission established by the Busi-

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[5]In his argument before the California Supreme Court, counsel for respondent devoted substantial time—more than six pages in the transcript of oral argument—to reading from and summarizing a number of newspaper articles which petitioner had written several years before. [Transcript of oral argument before Supreme Court of California, pp. 30-36.] This fact is especially worthy of note by virtue of the fact that these were the self-same articles upon which the State Bar relied as part of its rationale for refusing to certify Konigsberg the first time; these articles were before this court upon its first hearing of this case and were considered in its opinion (353 U. S. 268-269). They were dismissed by the Court as "not unusually extreme" and as a legitimate editorial commentary upon public officials and events giving rise to neither an inference of bad moral character nor an inference of advocacy of violent overthrow (353 U. S. 272-273).

ness and Professions Code of the State. An applicant must be:

1. Properly educated;
2. Of good moral character;
3. A person who does not advocate the overthrow of the Government of the United States of the State of California by force, violence or other unconstitutional means.

There is no dispute here that petitioner met all necessary educational requirements almost 6 years ago and this court found in *Konigsberg v. State Bar* that petitioner met all the prerequisites for admission.

The record is devoid of any showing that the legislature of the State of California has passed any legislation authorizing denial of admission to the bar solely because an applicant declines to answer questions of the nature propounded to this petitioner.[6] Such legislation would be a denial of due process and equal protection of the law if applied to this petitioner at this late date. But the efforts to promulgate such a rule by casual "across the table" warning of the Chairman and/or other members of the Committee of Bar Examiners during the course of a Hearing held subsequent to the opinion and mandate of this court, seven years after petitioner commenced the study of law and four years after he complied with all statutory requirements and all rules set forth in the adopted Rules of the Committee of Bar Examiners becomes capricious, arbitrary and a violation of petitioner's constitutional rights.

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[6]As a matter of fact efforts to pass such legislation have been repeatedly defeated in the California Legislature. See among others Senate Bill 1666, 1951 California Legislative Session; Senate Bill 298 in 1949 Session, and Assembly Bill 1800, 1955 Session.

3. This court found that petitioner's refusal to answer questions relating to his political affiliations and associations was founded upon good faith and that based upon prior decisions of this court was not frivolous (353 U. S. 270). Again, the subsequent record only reinforces this showing of good faith; and respondent in effect conceded this good faith when it failed to lay any foundation for asking further questions regarding petitioner's political associations and failed to show any other acts on the part of petitioner justifying a denial of admission to the Bar. Respondent simply rests its entire denial on the refusal to answer the identical questions which petitioner had refused to answer prior to the opinion and mandate of this court in *Konigsberg v. State Bar*. Since respondent has not moved forward with any evidence to counterbalance petitioner's *prima facie* showing its denial of admission continues to constitute a denial of due process just as it did when before this court the first time.

4. The majority of the Supreme Court of California relies on the decisions of this court in *Beilan*[7] and *Lerner*[8] to justify its decision below. Neither of these decisions affects the validity of the position taken by the petitioner herein. Both *Beilan* and *Lerner* relied upon the Fifth Amendment. Konigsberg relied upon high moral principle and his responsibility as a citizen of a free society to resist encroachments upon the rights of free speech and association. Both *Beilan* and *Lerner* involved the relationship between employer and employee, the essence of which is the right to hire and fire unless specifically checked by statute. The State has not the right nor can it be permitted to exercise the right of an em-

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[7]*Beilan v. Board of Education*, 357 U. S. 399.

[8]*Lerner v. Casey*, 357 U. S. 468.

ployer in its selection of prospective admittees to the Bar. The sole responsibility of the State is to measure the candidates educational and moral qualifications against established and announced principles which cannot include standards of political conformity. Finally in each of these cases, either Statute or decision within the states had equated failure to answer all questions with doubt of "reliability" or with "incompetency" as an employee. In California no prior case or statute or rule has ever established any such equation. To permit application of employer-employee principles to the relationship between the state and the lawyer would destroy the independence of the bar and with it one of the foundation stones of American democracy.

In this case no rational relationship exists between the political opinions, membership and/or associations of petitioner and his suitability for the practice of law. To arbitrarily exclude petitioner from membership in the Bar because of his declination to answer questions not provided for by law, rule or otherwise (and which if so provided for would violate the First Amendment) denies petitioner due process of law and equal protection of the laws. This court has said that eligibility for public employment can be conditioned only on requirements which have a rational relationship to fitness[9] and that the rights of a citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling[10] are rights protected by the due proc-

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[9] *Wieman v. Updegraf*, 344 U. S. 183.

[10] *Allgeyer v. Louisiana*, 165 U. S. 578, 589.

ess clause of the Fourteenth Amendment against State action. That these rights are not denied the applicant for admission to the Bar has already been demonstrated by this court in *Konigsberg v. State Bar* and *Schware v. Board of Bar Examiners.*[11]

Special care must be taken to prevent arbitrary action of the state in denying otherwise qualified applicants admission to the Bar because of the vital need for a free and independent Bar so fundamental to the preservation of liberty and democracy.[12]

5. In the light of this fundamental freedom to choose a profession of one's own choice, which this court has considered as a right of property or liberty to be protected within the due process clause of the Fourteenth Amendment, clearly any political restraint placed upon the applicant for membership in the Bar of a State is one which must be viewed with great caution. As Mr. Justice Traynor in his dissenting opinion in this case stated,

> "Inquiry on the issue of advocacy of the unlawful overthrow of the government is a greedy camel; it

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[11]353 U. S. 232.

[12]"We recognize the importance of leaving states free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be un-intimidated—free to think, speak and act as members of an independent bar." (*Konigsberg v. State Bar*, 353 U. S. 252.)

does not easily take its leave. It has a way of moving on into the domain of lawful economic and political belief, speech and activity." (52 A. C. 799, 806.)

A large portion of the time of the legal profession is devoted to advocacy hostile to the position of the State itself. Such hostility appears in criminal proceedings, in proceedings before Administrative Boards and even, to be sure, in proceedings before the State Bar itself.

When one weighs in the constitutional balance the value to the State Bar of securing answers to the questions propounded in this case (and on the record of this case) against the dangers to society in permitting the establishment of political qualifications for prospective lawyers, it should be clear that the dangers far outweigh the benefit.

Certainly the legal profession does not fall within the unforseen circumstances "permitting an exception" to the general principle that "if there is any fixed star in our constitutional constellation, it is that no official, higher or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein" (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642).

The existence of the California code section dealing with advocacy of force and violence does not vitiate this principle for in this case petitioner offered to respond

to any and all questions relating to advocacy of force and violence,[13]

6. We have here no capricious momentary decision of an applicant declining to answer a particular question. We have instead a deeply principled decision of a mature applicant. This decision was taken at the first meeting of the Committee of Bar Examiners prior to the time that petitioner was represented by Counsel. The record indicates that the same position was taken in prior years at hearings under other circumstances. The record indicates that this position was taken in newspaper articles written by petitioner. The record indicates that petioner based his position upon a deep and profound belief that all citizens must maintain their principles and conscience regardless of the personal effect of such decisions.

Petitioner stated:

> "Mr. Chairman, the question, of course, is similar to the question asked me four years ago, though phrased somewhat differently, and while I think we all change somewhat in four years even at this age in our thinking, the basic principle that I established in that case and in those hearings that questions regarding one's political thinking are protected by the First Amendment and have no bearing whatsoever on one's moral character, have, I think, pretty well been determined by the Supreme Court opinion in

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[13]There may be grave doubts as to the constitutionality of Section 6064.1 as an undue restriction on the First Amendment rights of applicants for the Bar. Since petitioner in this case chose to answer questions relating to this section, the constitutionality of this section need not be reached in this proceeding.

my case. And certainly having the Supreme Court vindicate my opinions and principles which are now in effect and in a sense the law of the land because of the Supreme Court opinion, I could hardly be expected at this point for expediency to give up principles that have been upheld by the highest court of our country."[14] [Sept. Rec. p. 28].

7. On this record, with no evidence of wrong doing, no questions asked as to petitioner's good moral character or his advocacy of force and violence and without the respondent coming forward with some additional adverse information requiring answer by the petitioner, to require petitioner to reveal his political affiliations in violation of his principles and private conscience is to deprive petitioner of the right to follow his chosen calling or freedom of speech, press, assembly and conscience, contrary to due process clause of the Fourteenth Amendment. In effect such action says to the petitioner that in order to establish his good moral character to the satisfaction of respondent he must violate his own moral standards and become in his own eyes an immoral person.

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[14]Konigsberg said further:

"That is what the Supreme Court ruling, and constitution says. You cannot and have no right, and it is my duty as a citizen to resist your doing this, what is to me an unconstitutional act. The thing always followed, and I remember distinctly in the Army orientation programs I had reference to in past hearings, when General Marshall and Eisenhower set up the programs said, 'It is our duty to educate soldiers to become good citizens.' They made it very clear and in many writings you have as part of the record that it isn't enough for Americans to accept the various privileges that citizenship grants to them. There are certain deep responsibilties that go with those privileges, and unfortunately most of us don't know them, don't accept them, and are not taught them." [Sept. Rec. p. 25.]

Conclusion.

For these reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD MOSK,

Attorney for Petitioner.

SAMUEL ROSENWEIN,

Of Counsel.

EXHIBIT A.

"THE COMMITTEE OF BAR EXAMINERS
of the State Bar of California

May 17, 1954

To: Raphael Konigsberg, Applicant
2446 Echo Park Avenue
Los Angeles 26, California

and

Edward Mosk, Esq., Applicant's Attorney
6305 Yucca Street
Hollywood 28, California

Pursuant to your request of February 11, 1954, the record in the matter of your application for certification to the Supreme Court for admission to practice law which was before the Southern Subcommittee, has been reviewed by the entire Committee. In addition, a further hearing was held before the Committee on March 13, 1954.

It is the Committee's determination that you have not sustained the burden of proof (1) that you are possessed of the good moral character required by Section 6060(c) of the State Bar Act, or (2) that you comply with the provisions of Section 6064.1 of said Act.

Your application is denied.

By order of the Committee of Bar Examiners.

/s/ GOSCOE O. FARLEY,
Goscoe O. Farley,
Secretary.

GOF:vz."

EXHIBIT B.

In the Supreme Court of the State of California.

Raphael Konigsberg, Petitioner vs. State Bar of California and the Committee of Bar Examiners of the State Bar of California, Respondents. L. A. No. 23266.

REPORT OF THE COMMITTEE OF BAR EXAMINERS

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

I.

On July 10, 1957, the following order was made in the above entitled matter:

> "Pursuant to mandate of the Supreme Court of the United States, it is ordered that the decision of this Court, filed April 20, 1955, be vacated, and the matter of admitting Raphael Konigsberg to the practice of law in all the courts of this State is referred to the Committee of Bar Examiners for further proceedings.
>
> "CARTER, *J.* is of the opinion that the application of Raphael Konigsberg for admission to practice law in all of the courts of this State should now be granted.
>
> (S) GIBSON, Chief Justice."

II.

Pursuant to this order, the following action was taken by the Committee of Bar Examiners in the matter of the application of Raphael Konigsberg for admission to practice law in the State of California:

(1) The Committee carefully considered the opinion of the Supreme Court of the United States in the matter entitled "Raphael Konigsberg, Petitioner, vs. State Bar of California and Committee of Bar Examiners of the State Bar of California," decided May 6, 1957, 353 US ....., 1 L ed 2d 810, 77 S Ct .....

(2) On September 21, 1957, at a meeting of the Committee in Los Angeles, at which all of the members of the Committee were present, the applicant appeared with his attorney, Edward Mosk, Esq. At this meeting the applicant's petition for admission was further heard by the Committee. An argument by the attorney for the applicant in support of the application for admission was also heard. The applicant was sworn and testified at the hearing. A witness produced by the applicant was sworn and testified. Written evidence was offered by the applicant, and was received by the Committee. The written record of all previous hearings by the Committee and one of its subcommittees on the application of Raphael Konigsberg for admission was incorporated as part of the record of the further hearing, by the stipulation of the applicant and by the Committee.

(3) The application was then submitted by the applicant and by his attorney.

III.

At the hearing on September 21, 1957, the Committee advised the applicant and his attorney that the refusal of applicant to answer material questions put to him by the Committee would obstruct the investigation by the Committee of applicant's qualifications for admission to practice law, with the result that the Committee would not be able to certify him for admission.

IV.

At the hearing on September 21, 1957, applicant refused to answer any questions put to him by the Committee concerning his past or present membership in or affiliation with the Communist Party.

V.

After further consideration of the entire record before it, the Committee finds and concludes:

(1) That the questions put to the applicant by the Committee concerning past or present membership in or

affiliation with the Communist Party are material to a proper and complete investigation of his qualifcations for admission to practice law in the State of California.

(2) That the refusal of applicant to answer said questions has obstructed a proper and complete investigation of applicant's qualifications for admission to practice law in the State of California.

(3) That the refusal of applicant to answer said questions has obstructed a necessary and proper function of the Committee under Section 6046 and related sections of the Business & Professions Code of the State of California and under the Rules Regulating Admission to Practice Law in California adopted pursuant to Section 6047 and related sections of said Code.

(4) That in view of the foregoing, the Committee is unable to certify that applicant possesses the requisite qualifications or has fulfilled the requirements for admission to practice law in the State of California.

IN WITNESS WHEREOF, the Committee of Bar Examiners of the State Bar of California respectfully submits this report of its proceedings on the reference made to it by the Supreme Court of the State of California on July 10, 1957, together with the transcript of the hearing before the Committee on September 21, 1957, and the exhibits submitted by the applicant at that hearing.

DATED: November 9, 1957.

SHARP WHITMORE
VINCENT H. O'DONNELL
GEORGE HARNAGEL, JR.
FORREST E. MACOMBER
GERALD P. MARTIN
THOMAS H. MC GOVERN
JOHN B. SURR

The Committee of Bar Examiners
of the State Bar of California
By SHARP WHITMORE
Chairman

EXHIBIT C.

Decision of the Supreme Court of California.

[L. A. No. 23266. In Bank. Oct. 16, 1959.]

Raphael Konigsberg, Petitioner, v. The State Bar of California *et al.*, Respondents.

Proceeding to review action of the Committee of Bar Examiners in refusing to certify petitioner for admission to practice law and application to the Supreme Court for admission to practice. Petition for review denied; application to Supreme Court denied.

Edward Mosk for Petitioner.

A. L. Wirin, Fred Okrand and Hugh R. Manes as Amici Curiae on behalf of Petitioner.

Frank B. Belcher, Robert D. Burch and Ralph E. Lewis for Respondents.

The Court.—Petitioner seeks review of the action of the Committee of Bar Examiners in refusing to certify him to this court for admission to practice law in California. Also, he has applied directly to this court for admission to practice.

The Committee of Bar Examiners is established by the Board of Governors of The State Bar of California pursuant to statutory authority. It conducts the bar examinations and certifies directly to this court those applicants for admission who fulfill the requirements of the code (Bus. & Prof. Code, §6046). This court may admit to practice any applicant so certified (Bus. & Prof. Code, §6064). An applicant who is refused certification may have the action of the committee reviewed by this court (Bus. & Prof. Code, §6066).

The code specifically provides (§6064.1) that "[n]o person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified . . . for admission. . . ."

In October, 1953, petitioner took and passed the written bar examination. Shortly before that examination, and on several later occasions, hearings were conducted by a subcommittee and the full Committee of Bar Examiners.

An ex-Communist testified that petitioner had attended meetings of a Communist Party unit in 1941. Petitioner offered much evidence of his satisfactory service in the Army during World War II, and of his good character and loyalty. The evidence of these hearings is reviewed in some detail in the several opinions in Konigsberg v. State Bar, 353 U. S. 252 [77 S. Ct. 722, 1 L. Ed. 2d 810]. Petitioner denied that he advocated overthrow of the government, but refused to answer any questions of committee members as to his membership in the Communist Party, asserting that such inquiries infringed rights guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States.

The committee, by letter of May 17, 1954, advised petitioner that his application was denied on grounds that he had not sustained his burden of establishing that he (1) possessed the good moral character required by section 6060, subdivision (c), of the code, or (2) did not advocate unlawful overthrow of the government, the showing required by section 6064.1.

Petitioner thereupon sought review by this court. His petition was denied April 20, 1955, without opinion, by a divided court. The United States Supreme Court granted certiorari. On May 6, 1957, that court, with three justices

dissenting and one not participating, reversed and remanded the matter to this court "for further proceedings not inconsistent with this opinion" (Konigsberg v. State Bar, *supra*, 353 U. S. 252).

In doing so, the United States Supreme Court held (p. 273) that "there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government."

That court specifically pointed out (p. 259) that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions," and noted that he had not been told that he would be barred "just because he refused to answer relevant inquiries or because he was obstructing the Committee." In this connection it was said (p. 261) that "Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone. . . ."

The court stated (353 U. S. at pp. 261-262) that "If it were possible for us to say that the . . . [committee] had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the . . . [committee] itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is

constitutionally permissible. We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him."

Following the remand, this court vacated its prior order denying the petition for review and referred the entire matter, including the application for admission to the bar filed with us by petitioner after the decision of the United States Supreme Court, to the Committee of Bar Examiners for further proceedings. The committee conducted a hearing September 21, 1957.

At this hearing, the records of all previous hearings were incorporated by stipulation as part of the record, petitioner and a witness called by him were examined, and petitioner introduced letters recommending him as to character and loyalty. No evidence additional to that received in the 1953-1954 hearings was offered as reflecting on petitioner's loyalty or to show his advocacy of overthrow of the government. Thus a finding that he was not of good moral character or that he advocated overthrow of the government would be inconsistent with the decision of the United States Supreme Court upon the previous record.

At the 1957 hearing, however, the committee did fully advise petitioner and his counsel that his refusal to answer material questions put to him by it would obstruct its investigation of his qualifications to practice law, with the result that the committee would not be able to certify him for admission. It was made clear to him that questions concerning membership in the Communist Party were deemed material. Nonetheless, petitioner refused to answer any and all questions put to him by the committee concerning either past or present membership

in or affiliation with the Communist Party. The committee then found that Konigsberg had refused to answer its questions as to his membership in or affiliation with the Communist Party, that these questions were material to a proper determination of his qualifications, that his refusal to answer had obstructed the investigation which the statute requires, and that because of this refusal the committee is unable to certify him for admission.

It is this action which petitioner seeks to have reviewed. It differs materially from that of 1954. The committee action now before us contains no findings or conclusion that petitioner had failed to establish either his good moral character or his absention from advocacy of overthrow of the government.

Here it is the refusal to answer material questions which is the basis for denial of certification. Petitioner's refusal to answer is conceded. The issue is whether the questions are material. We think their materiality is clear. The committee is enjoined against certifying for admission to practice any person who "advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means." (Bus. & Prof. Code, §6064.1.) This provision clearly requires the committee to inquire as to such advocacy. The Congress (68 Stat. 775; 50 U. S. C. §841) and the California Legislature (Gov. Code, §1027.5) have declared that the Communist Party does advocate such overthrow. It follows that inquiry as to membership in that party is relevant and material in determining whether the proscribed advocacy exists. Petitioner refused to answer questions as to such membership at periods after the statutory proscription and after the legislative declarations of the purpose of the Communist Party. As we have noted, he

persisted in his refusal after being warned that such conduct would be deemed to require denial of his certification by the committee.

We are unable to distinguish this situation from that presented in Beilan v. Board of Public Education, 357 U. S. 399 [78 S. Ct. 1317, 1324, 2 L. Ed. 2d 1414, 1433]. There a school teacher refused to answer questions as to his loyalty. This refusal was made the basis for a finding of "incompetency." There, as here, there was no finding that the individual was in fact disloyal, but merely a finding that his refusal to answer questions pertinent to his loyalty revealed a lack of candor which constituted unfitness. Our case is somewhat stronger in that here a statute specifically requires the committee to certify that petitioner does not advocate overthrow of the government, and the questions as to party membership bears upon that issue. In Beilan, as here, there was no rule specifically providing that the failure to answer would be deemed ground for adverse action, but here, as there, the investigating authority gave clear warning that such a result would follow.

In its previous decision in this case, the United States Supreme Court held only that the evidence was insufficient to sustain a finding that petitioner is not of good moral character. The present record contains no additional evidence on that subject. However, the refusal to certify for admission is, on the present record, based wholly upon his refusal to answer pertinent questions. This ground was specifically left open in the earlier decision of that court and subsequent decisions have recognized this fact. (Beilan v. Board of Public Education, *supra*, p. 409; Lerner v. Casey, 357 U. S. 468, 478 [78 S. Ct. 1311, 1324, 2 L. Ed 2d 1423, 1433].)

Determination whether petitioner was a member of the party which has been legislatively determined to advocate overthrow of the government was blocked by his refusal to answer. Such refusal likewise effectively prevented the committee from reaching the question whether, if he were such a member, his membership was knowing or innocent. The committee's refusal to recommend him for admission was based upon his refusal to answer inquiries about his relevant activities—not upon those activities themselves. Thus its refusal is fully justified under the rule of Beilan, which disposes of his claim that his constitutional rights have been infringed.

Petitioner does not question the constitutionality of the code section which prohibits certification of one who advocates unlawful overthrow of the government, nor of the federal and state legislative declarations that the Communist Party seeks such overthrow. Implicit in the statutory provision for review of the committee's refusal to certify an applicant is the power of this court to admit one not so certified. But to admit applicants who refuse to answer the committee's questions upon these subjects would nullify the concededly valid legislative direction to the committee. Such a rule would effectively stifle committee inquiry upon issues legislatively declared to be relevant to that issue. We cannot in good conscience deny the committee the right to inquire into a matter as to which it must certify. Whether the members of this court consider such a statute effective, practical or wise is irrelevant. We do not act in a legislative capacity. Rather, we recognize and enforce legislation which is valid.

We adopt and approve the findings of the committee stated in the 1957 report. The petition for review and the application for admission to the bar are denied.

Gibson, C. J., deeming himself disqualified, did not participate.

Draper, J., sat pro tempore in place of the Chief Justice.

White, J., not having been a member of the court at the time of oral argument, did not participate.

Traynor, Acting P. J.—I dissent.

The United States Supreme Court has determined that Konigsberg was denied due process of law and equal protection of the laws on the ground that "the evidence does not rationally support the only two grounds upon which the Committee relied in rejecting his application for admission to the California Bar." (Konigsberg v. State Bar, 353 U. S. 252, 262 [77 S. Ct. 722, 1 L. Ed. 2d 810].) In its words, "there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law." (353 U. S. at 273.)

It declined to determine whether Konigsberg could be excluded from practice solely because of his refusal to answer questions, stating:

"There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of

good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply. In our opinion, there is nothing in the record which indicates that the Committee, in a matter of such grave importance to Konigsberg, applied a brand new exclusionary rule to his application—all without telling him that it was doing so.

"If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him." (353 U. S. at 260, 262, footnotes omitted.)

The United States Supreme Court reversed the judgment of this court and remanded the case "for further proceedings not inconsistent with this opinion." (353 U. S. at 274.) In view of the questions expressly left unde-

cided and the court's remand, it is my opinion that this court is not foreclosed by the United States Supreme Court's decision in this case from adopting and applying to Konigsberg a rule making failure to answer relevant questions with respect to his qualifications an independent ground for exclusion.

An applicant ordinarily has the burden of establishing his qualifications to practice law, and if he refuses to answer questions relevant to his qualifications, it is my opinion that this court is justified in denying him admission. Given the congressional and state legislative findings with regard to the Communist Party and the adjudications of guilt of its leaders of criminal advocacy, a question as to present or past membership in that party is relevant to the issue of possible criminal advocacy and hence to the applicant's qualifications.

Whatever its relevancy in a particular context, however, it is an extraordinary variant of the usual inquiry into crime, for the attendant burden of proof upon any one under question poses the immediate threat of prior restraint upon the free peech of all applicants. The possibility of inquiry into their speech, the heavy burden upon them to establish its innocence, and the evil repercussions of inquiry despite innocence would constrain them to speak their minds so noncommittally that no one could ever mistake their innocuous words for advocacy. This grave danger to freedom of speech could be averted without loss to legitimate investigation by shifting the burden to the examiners. Confronted with a prima facie case, an applicant would then be obliged to rebut it.

Such a procedure is logically dictated by Speiser v. Randall, 357 U. S. 513 [78 S. Ct. 1332, 1352, 2 L. Ed. 2d 1460]. The court there assumed that the state could deny

a tax exemption to one whose advocacy of the unlawful overthrow of the government was such that it could be punished as a crime. Mindful of the risks to free speech, however, it took care to hold that the state could not compel the taxpayer to prove his right to an exemption and that therefore an oath as to his innocence of unlawful advocacy could not be required. There may be differences of degree in the public interest in the fitness of the applicants for tax exemption and for admission to the Bar. Even though the state may have more at stake in the latter situation, it is not therefore freer to endanger free speech needlessly.

Inquiry on the issue of advocacy of the unlawful overthrow of the government is a greedy camel; it does not easily take its leave. It has a way of moving on into the domain of lawful economic and political belief, speech, and activity. It bears noting that such advocacy, whether it carries criminal or civil sanctions, is unlike crimes whose elements readily set them apart from legitimate activity. (Cf., Dennis v. United States, 341 U. S. 494 [71 S. Ct. 857, 95 L. Ed. 1137], with Yates v. United States, 354 U. S. 298 [77 S. Ct. 1064, 1 L. Ed. 2d 1356].) It also bears noting that such advocacy is not invariably associated with even active membership in the Communist Party. (Yates v. United States, *supra*.)

Such considerations as these may have led to the result in Speiser v. Randall, *supra*, 357 U. S. 513. In contrast an applicant for public employment can be required to state whether or not he is or was a member of the Communist Party, as a condition of his employment. (Lerner v. Casey, 357 U. S. 468 [78 S. Ct. 1311, 2 L. Ed. 2d 1423]; Beilan v. Board of Public Education, 357 U. S. 399 [78 S. Ct. 1317, 1324, 2 L. Ed. 2d 1414, 1433];

Steinmetz v. California State Board of Education, 44 Cal. 2d 816, 823 [285 P. 2d 617]; Pockman v. Leonard, 39 Cal. 2d 676, 685-687 [249 P. 2d 267].) Since an attorney is neither a public employee nor a taxpayer seeking an exemption, we do not know how the United States Supreme Court would resolve the constitutional issue here. Still, it has emphasized the importance of an independent Bar, and it has declared that petitioner's insistence on a constitutional right not to answer the questions here involved was not frivolous. (Konigsberg v. State Bar, 353 U. S. 252, 270, 273 [77 S. Ct. 722, 1 L. Ed. 2d 810].)

We need not resolve the constitutional question, for the Legislature has not directed that section 6064.1 of the Business and Professions Code* be enforced by compelling applicants to answer all questions relevant to the proscribed advocacy, and significantly, it has not required declarations of nonadvocacy from members of the Bar. It rests solely with this court, in its supervision of admissions to the Bar, to determine whether petitioner must answer the questions in issue. The question is not whether the Legislature might constitutionally impose such requirements but whether this court should impose them. There is no good reason for the court to do so, particularly when the Legislature has made no attempt to impose them on practicing attorneys.

The United States Supreme Court has determined that Konigsberg established his good moral character and that he did not advocate unlawful overthrow of the government. In the subsequent hearing there was no additional

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*"No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."

evidence adverse to Konigsberg. The committee did no more than make clear to him that his failure to answer would be an independent ground for not certifying him to this court. Konigsberg chose to stand on his constitutional objections, and as the United States Supreme Court pointed out, there is "nothing in the record which indicates that his position was not taken in good faith." (353 U. S. at 270.) If the committee had evidence that would support a finding of unlawful advocacy, it could compel Konigsberg to disclose political statements and associations in rebuttal or forego admission to the Bar. As the United States Supreme Court held, the committee made no prima facie case against Konigsberg, and we are bound by that finding. I would therefore grant the petition of Konigsberg and admit him to the Bar of this state.

PETERS, J.—I dissent.

The majority opinion disregards the law of this case as already established by the United States Supreme Court. (Konigsberg v. State Bar, 353 U. S. 252 [77 S. Ct. 722, 1 L. Ed. 2d 810].) It misconstrues the high court's opinion, and in particular misconstrues the legal effect of the order of that court remanding the case "for further proceedings not inconsistent with the opinion." (Konigsberg v. State Bar, 353 U. S. at p. 274.) The result is that, in my opinion applicant has been denied due process and equal protection.

The only issues before The State Bar in its first proceeding were whether the applicant was of good moral character and whether he advocated the forceful overthrow of the government of the United States. The burden was upon applicant to establish those facts. Lengthy hear-

ings were held. At these hearings applicant furnished overwhelming evidence of his good moral character and of the fact that he did not advocate and had never advocated the forceful overthrow of the government. He refused to answer any question as to his political affiliations. The State Bar refused to certify the applicant for admission on the ground that he had failed to sustain his burden on the two issues involved. The applicant sought review by this court. The petition was denied without opinion. The United States Supreme Court granted certiorari. That court then reversed this court and The State Bar and held that the applicant had sustained his burden of proof on the two key issues, and that on the showing made the applicant should have been certified for admission. The case was remanded "for further proceedings not inconsistent with this opinion." (Konigsberg v. State Bar, 353 U. S. at p. 274.)

Following this remand this court, by a divided vote, instead of certifying the applicant, vacated its prior order and referred the case back to The State Bar for further proceedings. No showing was then or later made that any new evidence or facts had been discovered. The State Bar then held a so-called hearing. It was stipulated that the entire prior record should be introduced. The State Bar had admittedly hired an investigator to check on the applicant while the case had been pending in the courts, but it did not produce him or offer any evidence at all. The petitioner produced additional evidence in further support of his contentions that he was of good moral character and a loyal citizen. No question was asked him that had not been asked on the prior hearing, and no answer was given that had not already been given. The only difference between the two hearings was that at the

last one petitioner was warned that his failure to answer questions as to his political affiliations could be construed as lack of cooperation that would justify a denial of his application.

Thus petitioner, in the first hearing, presented overwhelming evidence that he was of good moral character and a loyal citizen. The highest court in the land so held. Then, on precisely that same record, the record that the high court had held demonstrated that the applicant had sustained his burden as a matter of law, the majority of this court have held that The State Bar properly denied certification because this time applicant was warned that the failure to answer certain questions would be construed as lack of cooperation. How many times does the issue of whether applicant possesses a good moral character and is a loyal citizen have to be tried? Those were the issues presented. Having sustained his burden as to those issues, on what rational theory can it be held that The State Bar, at this late date, with no new evidence, can offer a new and different excuse for denying certification? When does this litigation come to an end? I had always thought, until I read the majority opinion in this case, that our system of law was predicated on the fundamental theory that, when issues between litigants have once been determined, they cannot be relitigated. I had always thought that litigants were required to raise all relevant issues in one proceeding. I had assumed that parties cannot litigate their case piecemeal.

The majority purport to find sanction for this violation of fundamental principles in the order of the United States Supreme Court, heretofore quoted, remanding the case "for further proceedings not inconsistent with this opinion" (Konigsberg v. State Bar, 353 U. S. at p. 274),

and in several sentences contained in the opinion. The majority do not quote all the relevant language. At page 259 of the high court opinion appears the following:

"In Konigsberg's petition for review to the State Supreme Court there is no suggestion that the Committee had excluded him merely for failing to respond to its inquiries. Nor did the Committee in its answer indicate that this was the basis for its action. After responding to Konigsberg's allegations, the Bar Committee set forth a defense of its action which in substance repeated the reasons it had given Konigsberg in the formal notice of denial for rejection his application.

"There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, [and there is still nothing in such statutes, decisions or rules] that suggests that failure to answer a Bar Examiner's inquiry is *ipso facto,* a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply. In our opinion, there is nothing in the record which indicates that the Committee, in a matter of such grave importance to Konigsberg, applied a brand new exclusionary rule to his application—all without telling him that it was doing so.

"If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond

to its inquiries into his political associations and his opinions about matter of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him."

The majority opinion interprets the remanding order and the above-quoted portion of the opinion as a direction, or at least an authorization, to return the proceeding to The State Bar to permit it to refuse certification solely on the ground that Konigsberg had refused to cooperate by refusing to answer questions about his political affiliations. This is not a correct interpretation of the remanding order. Obviously, what the Supreme Court meant by the quotation, *supra,* is that California has never adopted a statute or a rule making failure to answer *ipso facto,* a ground for refusal to certify, and that The State Bar could not properly contend that on the record there involved such was a valid ground for refusal to certify. Without such a statute or rule the point could not be urged. Certainly the Supreme Court could not have meant that without a statute or rule the Board of Bar Examiners could create a "rule" simply by warning Konigsberg that the effect of refusal to answer would be to cause the board to refuse his certification. Such a warning, com-

ing four years after Konigsberg first appeared before the committee, does not comply with rules of "elemental fairness" as required by the Supreme Court of the United States.

Rules for admission to practice law are not to be adopted in this cavalier fashion. The only rules passed by the Legislature provide that the applicant must be of good moral character, and must not advocate the forceful overthrow. There is no rule about failing to answer. If California is to adopt a new rule relating to failure to answer questions, such rule or statute should be adopted in the manner rules and statutes are normally adopted. Here the so-called "rule" was adopted in the middle of a proceeding as an afterthought simply to justify the actions of the Bar Committee in refusing to certify Konigsberg for admission. To sanction such a procedure is not only unfair but, in my opinion, a denial of due process and equal protection.

After the careful review of the evidence made by the United States Supreme Court, and after holding that such evidence did not justify the refusal to certify, when the high court remanded the case "for further proceedings not inconsistent with this opinion" it meant, and must have meant, that this court was to grant the petition of Konigsberg, unless new facts relating to character or loyalty were produced. Any other action was necessarily inconsistent with the opinion of the Supreme Court of the United States.

Of course, had The State Bar made a showing that after the first hearings and while the case was on appeal it had discovered new evidence that Konigsberg was not of good moral character and not a loyal citizen, the case could have been remanded to The State Bar to hear and

consider that evidence. But no such showing was made and no such evidence produced.

Thus the majority opinion, in my view, violates the remand order of the United States Supreme Court.

In addition, the majority opinion also violates the law of the case as established by the high court. As already pointed out, all of the questions Konigsberg refused to answer were addressed to the inquiry as to whether he was or had been a member of the Communist Party. The only legitimate purpose behind those questions was to ascertain whether Konigsberg advocated or had ever advocated the forceful overthrow of the government of the United States. Konigsberg answered, and answered frankly, every question directed to that subject. The State Bar produced no evidence to the contrary. In discussing the answers given by Konigsberg, the United States Supreme Court (Konigsberg v. State Bar, 353 U. S. 252, at p. 271) had this to say: "Konigsberg repeatedly testified under oath before the Committee [and he gave similar answers at the last hearing] that he did not believe in nor advocate the overthrow of any government in this country by any unconstitutional means. For example, in response to one question as to whether he advocated overthrowing the Government he emphatically declared: 'I answer specifically I do not, I never did or never will.' No witness testified to the contrary. As a matter of fact, many of the witnesses gave testimony which was utterly inconsistent with the premise that he was disloyal. And Konigsberg told the Committee that he was ready at any time to take an oath to uphold the Constitution of the United States and the Constitution of California."[1]

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[1]This is the oath required by California law—Business and Professions Code, section 6067.

There is no evidence that Konigsberg now or at any other time has ever advocated the forceful overthrow, or ever belonged to any association that he knew so advocated. The evidence is all to the contrary. The United States Supreme Court after reviewing the evidence then before it, and no other evidence has been produced on the issue, had this to say (Konigsberg v. State Bar, 353 U. S. 252, at p. 273): "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar. In this case we are compelled to conclude that there is *no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government.* [Italics added.] Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action."

It must be remembered that at the various hearings Konigsberg produced evidence of 54 persons who testified in detail about almost every phase of his adult life. Not one word or one bit of evidence was produced to show that Konigsberg had ever committed a wrongful, improper or disloyal act. The evidence was all to the contrary. Applicant himself testified that he did not and never had advocated the forceful overthrow. The United States Supreme Court was much impressed by this testimony. An examination of that court's opinion will demonstrate to a certainty that it held that, on the record before it, and the present record is stronger in this respect, Konigsberg had affirmatively demonstrated that he possessed a good moral character and was a loyal citizen. This is the law of this case.

The high court stated that the issue before it was "Does the evidence in the record support any reasonable doubts about Konigsberg's good character or his loyalty to the Governments of the State and Nation? . . .

"Konigsberg claims that he established his good moral character by overwhelming evidence and carried the burden of proving that he does not advocate overthrow of the Government. He contends here, as he did in the California court, that there is no evidence in the record which rationally supports a finding of doubt about his character or loyalty. . . . If this is true, California's refusal to admit him is a denial of due process and of equal protection of the laws because both arbitrary and discriminatory. After examination of the record, we are compelled to agree with Konigsberg that the evidence does not rationally support the only two grounds upon which the Committee relied in rejecting his application . . ." (353 U. S. at p. 262.)

Then, after referring to the evidence produced by Konigsberg on the issue of his character, the court stated (353 U. S. at p. 265): "Other witnesses testified to Konigsberg's belief in democracy and devotion to democratic ideas, his principled convictions, his honesty and integrity, his conscientiousness and competence in his work, his concern and affection for his wife and children and his loyalty to the country. These, of course, have traditionally been the kind of qualities that make up good moral character. The significance of the statements made by these witnesses about Konigsberg is enhanced by the fact that they had known him as an adult while he was employed in responsible professional positions. Even more significant, not a single person has testified that Konigsberg's moral character was bad or questionable in any way."

After referring to evidence of Konigsberg's background the court refers to this evidence of character as "Konigsberg's forceful showing of good moral character" and comments on the fact that "there is no evidence that he has ever been convicted of any crime or has ever done anything base or depraved" the high court refers to certain arguments of The State Bar and concludes "When these items are analyzed, we believe it cannot rationally be said that they support substantial doubts about Konigsberg's moral fitness to practice law." (353 U. S. at p. 266.) This is the law of this case.

Then, after analyzing all the evidence on this issue relied upon by The State Bar, the court stated: "On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about

his political affiliations and opinions are unwarranted." 353 U. S. at p. 270.)

After discussing at length the evidence that The State Bar relied upon to show possible advocacy of forceful overthrow, the United States Supreme Court concluded with the statement already quoted but which bears repetition: "In this case we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. . . . It is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. . . . A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action." (353 U. S. at p. 273.) This, too, is the law of this case.

Thus it is the law of this case that the record before the Supreme Court of the United States established, as a matter of law, that applicant, without conflict, proved that he possessed a good moral character and was a loyal citizen. The present record is even stronger in this respect. If it be taken as established as a matter of law that applicant possesses such a character and is loyal, the two statutory requirements involved, of what relevancy is it that he refused to answer questions as to his political affiliations? The holding that mere refusal to answer the questions justified refusing certification, under the circumstances here, necessarily violates the law of the case as established by the high court.

Stated another way, if the record before the high court established these facts as a matter of law, the record

now before this court also, necessarily, shows these facts as a matter of law. Therefore, it is a necessary conclusion from the majority opinion that although Konigsberg affirmatively sustained the burden of showing by very substantial and uncontradicted evidence that he possesses a good moral character and is a loyal citizen, and although the record will support no other conclusion, he may be denied admission solely because he refused to cooperate by answering questions about his political affiliations. Thus, although the petitioner has affirmatively sustained his burden of proof, and there is no evidence or inference from the evidence to the contrary, the majority hold that he may be denied relief solely because he refused to answer questions as to his political affiliations.

For these reasons, and also for the reasons stated in the dissenting opinion of Mr. Justice Traynor, I would grant the petition of Konigsberg and admit him to the bar of this state.

EXHIBIT D.

1. Constitution of the United States.

A. The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law . . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. Section 1 of the Fourteenth Amendment to the United States Constitution provides in part:

> ". . . no state shall . . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

2. California statutes.

Admission to the Bar in the State of California is governed by the provisions of the California Business and Professional Code. The principal sections involved are:

A. "Section 6060. QUALIFICATIONS FOR APPLICANTS: To be certified to the Supreme Court for admission and a license to practice law, a person . . . shall:

"(c) be of good moral character. . . ."

B. "Section 6064.1 'ONE ADVOCATING THE OVERTHROW OF GOVERNMENT NOT TO BE ADMITTED:

> "No person who advocates the overthrow of the government of the United States or this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law. (added by Stats. 1951, Ch. 179, p. 432, Sec. 1.)"